State Personnel Board, State of Colorado

Case No. 99 B 107

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ROBERT GEORGE,

Complainant,

٧.

DEPARTMENT OF HIGHER EDUCATION, REGENTS OF THE UNIVERSITY OF COLORADO, UNIVERSITY OF COLORADO AT BOULDER,

Respondent.

Hearing on this matter was held June 21, 1999 at the State Personnel Board Hearing Room, Room B-65, 1525 Sherman Street, Denver, CO 80203, before Administrative Law Judge G. Charles Robertson. ¹

MATTER APPEALED

Complainant appeals the disciplinary termination imposed by Respondent and claims that Respondent discriminated against Complainant, based on disability, in imposing discipline. In this matter, based on the record of evidence, Respondent did not act in an arbitrary or capricious manner, nor did it act contrary to rule or law. Additionally, Complainant failed to make a *prima facie* case of discrimination based on disability.

The actions of the Respondent are upheld.

PRELIMINARY MATTERS

Respondent, Department of Higher Education, Regents of the University of Colorado, University of Colorado ("Respondent" or "CU"), was represented by Elvira

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¹ ALJ Robertson substituted for ALJ Thompson.

Strehle-Henson, Senior Assistant University Counsel, Office of the University Counsel, University of Colorado at Boulder, 203 Regent Administrative Center, Campus Box 13, Boulder, CO 80309. Thomas S. Carson, Director of Housing, was Respondent's advisory witness. Complainant, Robert George ("Complainant"), was represented *pro se*.

1. Procedural History

Complainant filed his Notice of Appeal on March 29, 1999. Complainant appealed his termination of employment with Respondent. Complainant claims the actions of CU were arbitrary, capricious, and/or contrary to rule or law. In addition, Complainant claims the action of the appointing authority was discriminatory, based on disability. The matter was referred to the Colorado Civil Rights Division for investigation. Subsequently, on May 18, 1999, Complainant was deemed to have waived an investigation of the discrimination claim for failure to timely file a verification of commencement of investigation. CU timely filed its prehearing statement and amended prehearing statement. Complainant failed to timely file a prehearing statement. On June 7, 1999, Complainant requested an extension of time to file a prehearing statement claiming that Complainant did not understand that a prehearing statement was due. Administrative Law Judge Thompson denied the request by way of order dated June 15, 1999.

Hearing on this matter was commenced and concluded on June 21, 1999. Given that Complainant was represented *pro se,* a detailed description of the hearing process was provided to Complainant. In addition, a detailed description of the burdens of proof was provided to Complainant given his claim of discrimination based upon disability.

2. Witnesses

Respondent called the following witnesses during its case-in-chief: (1) Roger Casias, Custodian I, Dining Services, Dept. of Housing, University of Colorado at Boulder, Boulder, CO; (2) Suzanne R. Dimond, Housekeeping Supervisor I, Dept. of Housing, University of Colorado, Boulder, CO; and (3) Thomas S. Carson, Assistant Director of Housing, Dept. of Housing, University of Colorado, Boulder, CO. Respondent did not present any witness for rebuttal.

Complainant called the following witnesses during its case-in chief: (1) Complainant. Complainant was limited to calling himself as a witness as a result of failing to file a prehearing statement.

3. Exhibits

The following Respondent's exhibits were admitted into evidence:

Exhibit #	Type of Exhibit	Objections Raised
Exhibit 3	Incident Report 10/7/98	No objection
Exhibit 4	Complainant's Written Statement	No objection
EXTINUTE 4	10/5/98	No objection
Exhibit 5	Notice to Complainant of R8-3-3	110 00,000.011
	Meeting	
	10/13/98	No objection
Exhibit 6	Complainant's Letter Agreement	-
	to Modify Behavior	
	10/18/98	No objection
Exhibit 7	Memo to Suzanne Dimond, et al.	
	From John Clark	
	10/19/98	No objection
Exhibit 9	Disciplinary Suspension	
	10/23/98	No objection
Exhibit 10	Incident Report	
	11/4/98	No objection
Exhibit 12`	Notice to Complainant of R8-3-3	
	Meeting	
E 1 11 11 40	11/10/98	No objection
Exhibit 13	Notice of Disciplinary Action	
	Suspension	
E 1 11 11 4 4	11/14/98	No objection
Exhibit 14	PACE	N 12 C
E. Libit 45	12/4/98	No objection
Exhibit 15	Incident Report	Nia alainatian
Fullibit 40	3/15/99	No objection
Exhibit 16	Notice of R-6-10 Meeting 3/15/99	No objection
Evhibit 17		No objection
Exhibit 17	Notice of Disciplinary Action Termination	
	3/19/99	No objection
	שפופו וט	ino objection

No other exhibits were offered by Respondent.

Complainant was precluded from offering any demonstrative exhibits as a result of failing to file a timely prehearing statement.

ISSUES

1. Whether the Complainant engaged in the actions for which discipline was imposed;

- 2. Whether the disciplinary termination was within the range of reasonable alternatives available to the appointing authority;
- 3. Whether the actions of the appointing authority constituted discrimination based on disability; and
- 4. Whether the actions of appointing authority were arbitrary, capricious, or contrary to rule or law.

STIPULATED FINDINGS OF FACT²

I. Background

- 1. The Complainant, Robert D. George, is appealing his termination from the Dept. of Housing at CU.
- 2. CU sent written notice of Complainant's termination by registered mail to Complainant on March 18, 1999, and Complainant signed for receipt of this notice on March 20, 1999.
- 3. The issue to be resolved by the Administrative Law Judge at hearing is whether CU's decision to terminate Complainant was due to alleged disability discrimination.
- 4. Complainant was hired as a Custodial Intern on a temporary basis on October 25, 1996, hired in a probationary basis under the State classified system as a Custodian Intern on December 9, 1996, and then certified in this position on December 9, 1997. During this period, Complainant reported to a Housekeeping Supervisor.
- 5. On November 24, 1996, Complainant filed a police report for criminal damage made in Baker hall in which he expressed his anger and frustration at "cleaning up for something that is beyond the normal scope of his daily responsibilities."
- 6. In 1998, Complainant applied for the position of Custodian I in Housing,

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² The parties stipulated to the essential facts listed in Respondent's Amended Prehearing Statement with the exception of a portion of #4(s) and all of #4(x). Subtopics are added for organizational purposes.

promoted to this position, effective June 29, 1998, and then certified into this position on December 29, 1998. In this position, Complainant reported to Suzanne Dimond, Housekeeping Supervisor in Baker Hall.

II. Incidents Re: Trash in Student Bathrooms and Disciplinary Action

- 7. On or before October 5, 1998, student(s) deposited room trash in the trash cans of the men's bathroom, #201RR, Baker hall, rather than taking this trash to the designated area for such trash outside Baker Hall. Angered by this incident, Complainant threw this trash around the bathroom floor, kicked it around, yelled, broke glass in the trash, and slammed the bathroom stall doors. A Baker Hall student resident was in one of these bathroom stalls and was hit when Complainant kicked the door open. This student filed an Incident Report Form dated October 5, 1998, describing the incident.
- 8. On October 7, 1998, Complainant deposited a box of trash on the desk of Suzanne R. Dimond and said that at least he was "getting someone's attention" about the trash problem in Baker Hall. When Ms. Dimond asked Complainant to remove the trash, Complainant responded by yelling at her and insisting that he was forcing the issue the only way it would be addressed. Ms. Dimond filed an Incident Report dated October 7, 1998 about this incident.
- 9. Complainant submitted a personal statement dated October 12, 1998 in which he regretted the two incidents described above. Complainant later wrote a cover letter dated October 18, 1998 to Thomas S. Carson, Assistant Director of Housing for Housing Services, forwarding a document that Complainant had prepared and signed titled, "Agreement to Modify Behavior."
- 10. Pursuant to State Personnel Board Rule 8-3-3(D)(1), the Complainant received written notification by letter dated October 13, 1998, that a meeting had been scheduled for him to present information about the two incidents described above.
- 11. On October 14, 1998, a Rule 8-3-3(D)(1) meeting was held to discuss the two incidents described above. During this meeting, Complainant said, "I should have taken a hike. I wasn't rational."
- 12. Pursuant to Rule 8-3-1(C), Complainant was informed by letter dated October 23, 1998 that his conduct on October 5, 1998 and October 7, 1998 constituted willful misconduct, warranting disciplinary suspension without pay for three working days. This letter also documented statements made by Complainant during the Rule 8-3-3(D)(1) meeting where he admitted to his behavior,

described his inappropriate conduct as "uncalled for," and said that it "wasn't the right thing to do," and that his "fuse just burned down to low."

III. Incidents with Electrical Contractor and Disciplinary Action

- 13. In a memorandum dated October 19, 1998, John Clark, Operations Manager, sent a memorandum to Suzanne Dimond, Mary Garza, and Kevin Huck, asking that specific closets in different student resident halls be emptied for conversion to ResNet use in those halls. ResNet allows resident hall residents to access CU's network and the Internet, via high-speed ResNet ethernet jacks, telephone, and long distance service. This information was discussed with the custodians working in Baker Hall, because their custodial closets would be affected by the ResNet installation.
- 14. On November 4, 1998, Complainant lost his temper and had a verbal altercation in the lobby of Baker Hall with Don Sealy, the electrical contractor who was installing ResNet in Baker Hall. When Peggy Bonner, Baker Hall Director, confronted Complainant about the altercation, Complainant quieted his voice and shooed her away with his hands, telling her she could go back into her "little hole." Instead, Ms. Bonner asked Complainant to come into her office with her to talk about it. In this conversation, Complainant compared talking to the contractor like "talking to a mule, when you deal with a mule first you have to bite their ear to get their attention, and then you have to yell at them to get them to do what you want." Ms. Bonner reported this incident to Suzanne Dimond, Complainant's supervisor, and both Ms. Bonner and Ms. Dimond each prepared incident reports about the incident.
- 15. Pursuant to Board Rule 8-3-3(D)(1), Complainant received written notification by letter dated November 10, 1998 by hand-delivery that a meeting had been scheduled with him on Wednesday, November 11, 1998 for him to present information about the incident of November 4, 1998, as described above.
- 16. On November 11, 1998, the Rule 8-3-3(D)(1) meeting was held to discuss the incident on November 4, 1998, as described above.
- 17. Pursuant to Rule 8-3-1(C), Complainant was informed by letter dated November 19, 1998 that his conduct on November 4, 1998, as described above, constituted willful misconduct, warranting disciplinary suspension without pay for ten working days. This letter also pointed out that his behavior on November 4, 1998 had occurred only one week after Complainant had returned from his disciplinary suspension for his inappropriate conduct of October 5, 1998 and October 7, 1998

18. The Disciplinary Action letter dated November 19, 1998 documented statements made by Complainant during his Rule 8-3-3(D)(1) meeting held on November 11, 1998 where he admitted to his behavior, as described by Ms. Bonner and Ms. Dimond. During the Rule 8-3-3(D)(1) meeting, Complainant also said, "I'm not paid to be a diplomat," "When I'm angry, I just like to dump," and "When you are talking to someone, and you aren't reaching them, you have to try something else," and "I probably won't change." Finally, during this Rule 8-3-3(D)(1) meeting, Complainant said that he was seeking medical help for depression. At this time, Complainant never provided a certificate from his physician nor did he ask for accommodation.

IV. Performance Appraisal

- 19. In the Complainant's PACE Form, dated December 4, 1998, Complainant received an overall "Good" rating with "Unacceptable" ratings in the areas of "Interpersonal Relations" and "Communications." In the performance appraisal narrative, Ms. Dimond, Complainant's supervisor, documented the Complainant's strengths as the Complainant having an "excellent work ethic . . . willingness to put in extra effort when needed . . . and good attendance." However, Ms. Dimond summarized Complainant's performance development as "Bob shows a lack of self control when dealing with contractors, students, and myself. Bob has demonstrated anger on more than one occasion to the point of disciplinary action."
- 20. In response to the December 1998 performance evaluation, Complainant disagreed with this evaluation as provided in his "Employee Comments" dated November 23, 1998. Complainant questioned the "validity of the rating as questionable," without "a clear and concise explanation of his deficiencies and the expected outcomes desired." Complainant also felt that Ms. Dimond failed to "list any employee strengths on page one" of the evaluation and did not feel that his disciplinary action letters should have been included as part of the evaluation.

V. Incidents of March 12, 1999 and Related Discipline

21. Closets #C227, C276, C253, and C252 in Baker Hall were closets that Complainant used. With installation of ResNet in Baker Hall and as described in John Clark's memorandum dated October 19, 1998, Complainant had been told that he was no longer allowed to store any supplies in either #C227 or #C252, because these closets would contain ResNet's sophisticated electrical

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³ It appears that the evaluation process was completed on 12/4/98 but that Complainant and his supervisor had met to discuss the evaluation in late November.

equipment.

- 22. On March 12, 1999, Suzanne Dimond was on the 2nd floor of Baker Hall and noticed that closet #C227 contained cleaning supplies. She told Complainant to remove these supplies and then asked him whether he had emptied his other closets designated for ResNet use. Complainant responded that he had emptied them, but when Ms. Dimond inspected the other closets, she found these closets still had supplies in them. When Ms. Dimond approached Complainant about this, he became very loud and used profanity, causing the students to open their doors to determine what was happening. Ms. Dimond called her supervisor, Kenneth A. Garry, because she felt very threatened by Complainant's behavior. Complainant yelled at Ms. Dimond and Mr. Garry, putting his face so close to Mr. Garry that Mr. Garry felt Complainant's spit on his face.
- 23. To document the above described altercation, Ms. Dimond prepared an incident report dated March 15, 1999, and Mr. Gary prepared a memorandum dated March 19, 1999.
- 24. Pursuant to Board Rule 6-10, the Complainant received written notification dated March 15, 1999 that a meeting had been scheduled with him on Wednesday, March 17, 19999 for him to present information about the incident of March 12, 1999.⁴
- 25. On March 17, 1999, the Rule 6-10 meeting was held to discuss the incident of Complainant's on March 12, 1999 as described above. At this meeting Complainant said, "I got angry . . . I elevated my voice . . . I made a mistake . . . I should have calmed down . . . I can't justify my behavior . . I have an ongoing problem with anger . . . I finished a three week anger seminar, but I haven't had an opportunity to practice it."
- 26. Pursuant to Rule 6-12, Complainant was informed by letter dated March 18, 1999 that his conduct on March 12, 1999, constituted misconduct. This letter also documented a pattern of Complainant's inappropriate behavior, warranting termination of his employment with CU at the close of business, March 22, 1999.

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⁴ Board Rule R-6-10, 4CCR 801 (1998) became effective 12/31/98.

FINDINGS OF FACT

(parantheticals refer to stipulated findings of fact, exhibits, witness)

1. All Stipulated Findings of Fact are herein adopted as Findings of Fact of the Administrative Law Judge.

I. Complainant's Past Behavior

- 2. Prior to working at CU, Complainant had worked as an engineer, a school teacher and other jobs characterized by Complainant as involving high stress. (George).
- 3. Complainant has a problem in coping with anger. (George).
- 4. On occasion, Complainant worked weekends with Roger Casias, a Custodian I, at CU. On one such occasion during the 1997 academic year, Complainant and Casias were assigned to strip floors. Such a project involved the use of wet/dry vacuums. (Casias).
- 5. In the process of stripping the floors, it was determined that an outlet used to run the machinery was not properly grounded. Upon discovering the problem, Complainant refused to continue the project and left the work area. Casias thereafter had a preference not to work with Complainant. (Casias).

II. Incidents re: Trash in Student Bathrooms and Disciplinary Action

- 6. Suzanne Dimond has been employed with CU for approximately 20 years. She has been a supervisor since the mid-1980s. (Dimond).
- 7. On October 7, 1998, Dimond completed an Incident Report regarding Complainant's behavior regarding trash in the student bathroom, Complainant's actions of depositing trash on Dimond's desk and the confrontation with Dimond. (Exhibit 3, SFOF 8, Dimond).
- 8. When Complainant left trash on Dimond's desk, he included a note which read: "this is some room trash that was left in the hall this morning. . . Can you talk to the Build[ing] Sec[urity] about informing the residents . . ." (Exhibit 3).
- 9. At the time of the confrontation, it was noted that Complainant was yelling at Dimond in order to foster resolution to the problem of student's leaving trash in the bathroom. (Dimond, Exhibit 3).

- 10. Dimond felt intimidated by Complainant as a result of the incidents in October 1998. (Exhibit 3).
- 11. In response to the October 1998 incidents, Complainant submitted a signed statement. (SFOF 9). The note outlines the residents' abuse of the Guide to Residence Hall Living and the residents' responsibility to take care of their own personal trash. Complainant admits to having a temporary loss of composure and that his actions failed to contribute to a solution. (Exhibit 4).
- 12. Complainant submitted an Agreement to Modify Behavior in which he stated that in the event a situation arises which angers him, he will take a "time out." (SFOF 9, Exhibit 6).
- 13. Complainant was given appropriate notice of the R8-3-3 meeting and such a meeting was held. (Exhibit 5, SFOF 10, 11). During the course of the meeting, Complainant did not indicate that he had any medical condition. (Carson).
- 14. Disciplinary action was appropriately administered by way of correspondence dated October 23, 1998. The discipline imposed was comprised of a disciplinary suspension without pay for a period of three working days. (Exhibit 9, SFOF 12).

III. Incidents with Electrical Contractor and Disciplinary Action

- 15. As a result of the ResNet installation, certain closets used by custodians had to be vacated. A memorandum was circulated identifying closets which needed to be vacated. (SFOF 13, Dimond, Exhibit 7). Custodians still had access to some closets in order to store their tools and supplies. (Dimond).
- 16. Custodians were not consulted prior to the memorandum being issued. (Dimond). Upon being informed, Complainant objected to the implementation of the memorandum. (Carson). He did not express anger at this time. (Dimond).
- 17. Subsequently, during the installation of ResNet, the electrical contractors left dust and dirt after having worked in Baker Hall and the ResNet closets. (Dimond).
- 18. An incident occurred in which Complainant made disparaging remarks to the electrical contractor. (Exhibit 10, SFOF 14).
- 19. Complainant was given appropriate notice of the R8-3-3 meeting and such a meeting was held. (Exhibit 12, SFOF 15, 16). During this second R8-3-3 meeting, Complainant indicated he was seeking help for depression. (Carson).

20. Disciplinary action was appropriately administered by way of correspondence dated November 19, 1999. (Exhibit 13, SFOF 17).

IV. Performance Appraisal

- 21. Dimond completed the performance evaluation of Complainant dated November 23, 1999. At the time, she believed that Complaint's performance was good except for the areas of interpersonal relations and communications. (Dimond, Exhibit 14, SFOF 19).
- 22. With the exceptions of Communication and Interpersonal Relations factors, Complainant's performance was excellent. (Dimond).
- 23. The narrative portion of the evaluation included reference to the recent disciplinary action. (Exhibit 14).
- 24. After Dimond had completed the PACE evaluation, she allowed Complainant to take it home and review it. On the day he returned the evaluation, he rushed into Dimond's office and asked if she would change the narrative portion. In the course of his conversation with Dimond, Complainant was loud and used some profanity. (Dimond, SFOF 20).
- 25. Dimond thought the incident was "scary." (Dimond).

V. Incidents of March 12, 1999 and Related Discipline

- 26. While walking through Baker Hall, Dimond noticed that a particular residency hall closet (C227) was stocked with cleaning supplies, despite the previous requirement of having to have this closet vacant for ResNet. (Exhibit 15, Dimond, SFOF22).
- 27. Dimond queried Complainant with regard to other closets. Complainant represented that no other closets that were to be dedicated to ResNet had custodial supplies. Dimond examined the closets and found supplies were in the additional closets. (Dimond, SFOF 22).
- 28. Dimond reported the incident to Ken Garry, her supervisor. (Dimond, SFOF 22).
- 29. Garry and Dimond discussed the matter and then invited Complainant to comment on the incident. At this time, Complainant became agitated, loud, and animated. During the conversation, Complainant tried to leave the office. His

- arms were flailing and he tried to exit the room. (Dimond).
- 30. Complainant believed that other custodians were not required to remove their supplies from closets. (Dimond).
- 31. Complainant was given appropriate notice of the R-6-10 meeting and such a meeting was held. (Exhibit 16, SFOF 24). Complainant did not disclose any type of medical condition. (Carson).
- 32. At some point in the course of the administration of discipline, Carson suggested that Complainant seek therapeutic assistance at Willard Hall and the Employee Assistance Program ("EAP"). (Carson).
- 33. Subsequent to the meeting, Carson did receive a telephone call from Complainant's psychiatrist indicating that Complainant was under going treatment. (Carson). At no time did the psychiatrist indicate that Complainant was suffering from a disability.
- 34. In determining what type of action to take, Carson was concerned about Complainant's actions vis-à-vis the potential for violence within the CU community, against Complainant's co-workers, and even students. (Carson).
- 35. Prior to reaching his conclusion to terminate Complainant, Carson reviewed Complainant's previous disciplinary history including: discipline associated with the incidents related to trash in student bathrooms; the depositing of trash on his supervisor's desk; Complainant's Agreement to Modify Behavior; and the incidents with the electrical contractor.
- 36. On March 18, 1999, disciplinary action was administered to Complainant consisting of termination. (Exhibit 17, SFOF 26, Carson).
- 37. Complainant is currently employed as a custodian in a local school district. (George).
- 38. At the time of his termination, Complainant was under the care of a psychiatrist who prescribed medications to aid in treatment of depression. (George).
- 39. At the time of his termination, Complainant was aware that at least one other individual at CU had serious problems in controlling his anger and one other individual abused alcohol.
- 40. Complainant is unaware if the individuals cited above have disabilities or

impairments.

- 41. Subsequent to his termination, Complainant sought additional medical opinions and one such opinion diagnosed Complainant with a bipolar disorder.
- 42. Complainant continues to wrestle with outbursts of anger.
- 43. Complainant never requested any accommodation for his disability prior to hearing.
- 44. Board Rule R-9-3, 4 CCR 801 (1998) provides, in part: "[d]iscrimination against any person is prohibited because of . . . disability. . . This applies to all employment decisions, including, but not limited to, those covered by C.R.S. 24-34-402."
- 45. C.R.S. 24-34-402 provides, in part:

It shall be a discriminatory or unfair employment practice: . . . for an employer to . . . discharge any person otherwise qualified because of disability . . .but with regard to disability, it is not a discriminatory or an unfair employment practice for an employer to act as provided in this paragraph . . . if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the person from the job, and the disability has a significant impact on the job;

DISCUSSION

I. INTRODUCTION

Certified state employees have a property interest in their positions and may only be terminated for just cause. *Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994)*. Such cause is outlined in State Personnel Board Rules R-6-12 and generally includes: (1) failure to comply with standards of efficient service or competence; (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment; (3) willful failure or inability to perform duties assigned; and (4) final conviction of a felony or any other offense involving moral turpitude.

In a disciplinary action of a certified state employee, the burden of proof is generally on the terminating authority, not the employee, to show by a preponderance of the evidence that the acts or omissions upon which discipline was based occurred and just cause existed so as to impose discipline. *Department of Institutions v. Kinchen,* 886 P.2d 700 (Colo. 1994).

In *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987), the Supreme Court of Colorado held that:

Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

In determining credibility of witnesses and evidence, an administrative law judge can consider a number of factors including: the opportunity and capacity of a witness to observe the act or event, the character of the witness, prior inconsistent statements of a witness, bias or its absence, consistency with or contradiction of other evidence, inherent improbability, and demeanor of witnesses. Colorado Jury Instruction 3:16 addresses credibility and charges the fact finder with taking into consideration the following factors in measuring credibility:

- 1. A witness' means of knowledge;
- 2. A witness' strength of memory;
- 3. A witness' opportunity for observation;
- 4. The reasonableness or unreasonableness of a witness' testimony;
- 5. A witness' motives, if any;
- 6. Any contradiction in testimony or evidence;
- 7. A witness' bias, prejudice or interest, if any;
- 8. A witness' demeanor during testimony;
- 9. All other facts and circumstance shown by the evidence which affect the credibility of a witness.

II. PARTIES' ARGUMENTS

Respondent argues that this is a disciplinary action and is not arbitrary, capricious, or contrary to rule or law. It maintains that the action was not discriminatory in nature and that Complainant was not subject to discrimination of any kind based on any disability. Respondent contends that Complainant is not disabled. And, Respondent maintains that any condition of Complainant should only be characterized as an impairment. That being so, it is Respondent's position that Complainant is not entitled to protection under Board rule, C.R.S. 24-34-402, or the guidelines of the ADA and no reasonable accommodation needs to be provided. Moreover, Respondent notes that Complainant failed to make a prima facie case of discrimination. In terms of administering discipline, Respondent argues that it has followed all Board rules and that

the discipline imposed, termination, was within the context of progressive discipline.

Complainant argues that the actions of Respondent are discriminatory based upon a "disability." It is Complainant's position that he is protected from discrimination under the rubric of the ADA. Complainant maintains that he is an individual with a disability that is manifested as a mental illness (anger outbursts). He argues that one of the problems in dealing with such a "disability" is that it is not often detected until after some type of problem has arisen, such as in this case at the workplace. Complainant states that he should receive some type of accommodation because both he and CU are aware that he suffers from outbursts of anger, depression, and other types of mental illness. George emphasizes the challenges associated with having a mental disability, including that of disclosing the problem to employers, co-workers, and other people.

III.

The findings of fact and the preponderance of evidence support Respondent's actions.

I. Discrimination

Simply put, at issue is whether Complainant suffered discrimination, by way of termination, based upon having a disability as defined in Board rule, state statute, or the quidelines of the ADA.

Given the claim of discrimination based upon disability, Complainant is charged with making a *prima facie* case for discrimination. As held in *Colorado Civil Rights Commission v. Big O Tires*, 940 P.2d 397 (Colo. 1997), a framework for analyzing claims of employment discrimination exists:

[T]he complainant must establish a <u>prima</u> <u>facie</u> case of discrimination by showing: (i) that the complainant belongs to a protected class; (ii) that the complainant was qualified for the job at issue; (iii) that the complainant suffered an adverse employment decision; . . and (iv) that the circumstance gave rise to an inference of unlawful discrimination.

Once a complainant establishes a <u>prima facie</u> case, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employment decision. Subsequently, an employee must then show that the employment decision was a pretext for discrimination.

A. Protected Class

In the past, the Board has relied upon federal interpretations of the American with Disabilities Act ("ADA"), 42 U.S.C. 12101 *et seq.*, for guidance in the implementation of its rules and state statute with regard to disability and discrimination. In order for an individual to be afforded protections analogous to the ADA, an individual must be a qualified individual with a disability. The first step in applying the above test in this matter is to determine if Complainant is a member of this protected class.

In determining if Complainant is a member of the protected class, Complainant must first demonstrate that he has a disability. "Disability" as defined under the ADA, consists of a physical or mental impairment that substantially limits one or more of the major life activities of an individual. See: 42 USC 12102(2)(B),(C). A physical impairment can include any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting a body system such as neurological, etc. A mental impairment can include any mental or psychological disorder, including mental or emotional illness. Major life activities can include such things as walking, speaking, seeing, hearing, learning, caring for oneself, and working. Impairments cannot be temporary in nature. See: Technical Assistance Manual, Americans with Disabilities Act, U.S. Equal Employment Opportunity Commission, (1992).

Complainant has failed to demonstrate that he is an individual with a disability as prescribed under the ADA, state statute, and Board rule. While Complainant may have a mental impairment, self-characterized as his inability to deal with anger or rage, depression and/or bipolar disorder, the **record** does not support that Complainant is a person with a disability. Complainant did not show that his impairment substantially limits one or more major life activity. In fact, Complainant's own testimony indicates that no major life activity was limited, including his ability to work. Complainant testified that he was able to perform his custodial-type job with another employer and thus, work in the same class or broad range of jobs.

This conclusion is supported *in Hamilton v. Southwestern Bell Telephone Co.*, 136 F.3d 1047 (5th Cir. 1998). In *Hamilton*, an employee told his supervisor that he had post-traumatic stress disorder and that he had been experiencing a variety of mental disturbances, including anger. Subsequently, that employee verbally assaulted and struck a co-worker. At that point in time, the employee was referred to an employee assistance program in which a therapist diagnosed him as having depression symptoms. Employee was subsequently fired. He sued his employer for discrimination under the ADA. At trial the jury held that no evidence was presented to demonstrate that the employee had a disability which substantially limited a major life activity, with the exception of working. With regard to working, the appellate court determined that

the employee could work in a class of jobs or broad range of jobs because the employee failed to produce any evidence otherwise. As a result, he was not subject to the protections of the ADA. In the present case, Complainant admitted that he had another job in the same class or job range. Thus, his ability to work was not substantially impaired and he failed to fall into the protected class as defined by the ADA.

Given the record in this case, Complainant cannot be considered to be a member of a protected class. He fails to make a *prima facie* case of discrimination.

II. Arbitrary, Capricious or Contrary to Rule or Law

Respondent successfully argues that its actions were not arbitrary, capricious, or contrary to rule or law. First, it is clear by Complainant's own admissions, that he engaged in the actions for which discipline was imposed. He inappropriately expressed anger after the incidents of March 12, 1999. Such actions, at the very least, can be characterized as constituting willful misconduct and unsatisfactory job performance. Such actions also support Respondent having a non-discriminatory reason for imposing discipline.

It is clear that Complainant had a pattern of unsatisfactory performance based on his outbursts. CU appropriately tried to interrupt this pattern by employing progressive discipline, in compliance with Board Rule R-6-2 and R-6-6, 4 CCR 801. Complainant's employment history with CU demonstrates that Respondent attempted to discipline Complainant short of termination, on two separate occasions. In determining whether or not to terminate Complainant related to the most recent incident, CU considered the nature and severity of Complainant's actions. It also reviewed and appropriately considered the prior disciplinary actions and the period of time since prior offenses. As the record demonstrates, despite discipline having been imposed upon Complainant in the form of suspensions, Complainant failed to correct his behavior. Such occurred despite Complainant having been advised of problems with his interpersonal relationships and his communication skills by way of his performance appraisal.

Complainant failed to timely and sufficiently advise Respondent of his impairment. At the time of termination, Respondent had notice that Complainant was experiencing depression. Yet, Respondent was never provided with any information regarding this impairment, even after Complainant was disciplined in November 1998 and after Complainant received a performance evaluation indicating his Needs Improvement rating in communications and interpersonal relations. It would not be unreasonable for Complainant to further explain his behavior and poor ratings after such disciplinary actions and evaluations were completed by Respondent. He failed to do so.

In *Phelps v. Field Real Estate Co.*, 793 F.Supp. 1535 (D.Colo. 1991), *aff'd* 991 F2d 645, rehearing *denied*, Phelps claimed discrimination under the C.R.S. 24-34-402 because he was discharged for being HIV positive. The employer claimed Phelps was terminated for poor work performance. In ruling on this matter, Judge Matsch addressed the issue of employer liability upon a showing the employer knew or should have known of the physical condition and need for accommodation. The court held that despite the employer being aware that Phelps had a condition, notice of only a condition did not create liability under the state statute because the employer did not have an appreciation of any need for special accommodation. In *Phelps*, the employee failed to provide any evidence that he had provided more than mere notice of a condition to the employer. In this case, Complainant did not provide any evidence of notice to Respondent demonstrating he was suffering from a condition that warranted special accommodation. Thus, Respondent cannot be held accountable and did not act in an arbitrary, capricious, or contrary to rule/law manner.

CONCLUSIONS OF LAW

- 1. The Complainant engaged in the actions for which discipline was imposed.
- 2. Disciplinary termination was within the range of reasonable alternatives available to the appointing authority.
- 3. Respondent's actions were not discriminatory based on disability.
- 4. The actions of the appointing authority were not arbitrary, capricious, or contrary to rule or law.

ORDER

The disciplinary action of Respondent is UPHELD.

Dated this 5th day of August, 1999 at Denver, Colorado

G. Charles Robertson Administrative Law Judge